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File No. S. Dwr. 3

Legal DEPARTMENT

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Subject :—

Suits. Dharwar.

In the court of the civil Judge
(Senior Division) Dharwar.
Long Cause Suit No. 126 of 1944.

Madhavrao Vasudevrao Gad of
Hubli ——— Pltff

V/s.

① Abdulkhadar Wd. Dadamiya
Barchiwale Mahalkary of
Mundargi Peth
② The Provincial Government
of Bombay ------ Defts.

Claim Rs. 5 |-

File No. S. Dwr. 3/46

Std. Sectt. Slip 24-B

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		claim — Rs. 51.	
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Long Cause Suit No.126/42 on the file of Civil Judge, Senior Division, --- Dharwar.
Plff:- Madhavrao Vasudevrao Gad of Dharwar.
vs.
Deft:- Abdulkhadar Dadamiya Barchiwale of Dharwar.
(2). The Provincial Government of --- Bombay.

Chronological Statement of Facts.

(1). The suit is for injunction restraining defts or their agents from preventing plaintiff in enjoyment of an easementary right of way - over the open space C.T.S. 56/M.F. of Dharwar which the plaintiff claims for going to the privy rooms situated on C.T.S.No.55/M.F. or for the Seavenger to go over it and cleanse the same.

(2). Plaintiff is the owner of and is in ----- possession of C.T.S.No.51/M.F. 52/M.F. 53/M.F. 54/M.F. There are two Bhangi lattrines on -- 55/M.F. alleged to have been built nearly 70 or 80 years ago and 6 rooms on 52,53,54 M.F. built about the same time. C.T.S. No.52/M.F. abuts on Muncipal Road.

(3). C.T.S.No.56/M.F. which adjoins all the C.T.S Nos is an open site belonging originally to Government. Defendent 1 has recently taken on lease in about 1937 the same from Govt. for a period of 30 years and is an occupant of it. Deft.No.1 after his purchase enclosed the open space purchased by him viz. C.T.S.No. 56/M.F. with a kachcha stone wall, leaving an open space in it which gives free access for plaintiff to go over the open land to enjoy his (plff's) properties C.T.S.51 to 55 and a passage for his Bhangi to go over the lattrines for cleansing them.

(4). Plaintiff alleges further that he has

acquired several rights of easements on the ~~xx~~ open space in C.T.S.No.56/M.F. for enjoyment of his properties viz. C.T.S.~~Nos~~. 51 to 55 M.F. . The said easementary rights are (1) a right of - passage over C.T.S.No.56/M.F. to go overto the lattrines (2) a right to discharge sullages/ wat~~er~~ on the C.T.S.No.56/M.F. from the bath - rooms and the latrines in his C.T.S.Nos.~~Sixtex~~ 51 to 55 M.F. (3) a ~~right~~ to discharge rain water over the said open land falling from the roofs of C.T.S.Nos.51 to 55 M.F. (4) a right to enjoy - light and air in respect of the said C.T.S. Nos (5) a right to go over on the C.T.S.No.56/M.F. and to ~~xtain~~ stop there for carrying on repairs to his properties. Plaintiff alleges he has been enjoying all these several easementary - rights for the last 70 or 80 years. But in - this suit plaintiff says he has restricted his claim only to a right of way over C.T.S.No. - 56/M.F. which he has to go over to the lattrines and to a right of passage for his Bhangi to go over it and cleanse the lattrines.

(5). On 20-7-1937 it appears the collector - gave the C.T.S.No.56B/M.F. on lease to deft. 1 on payment of Rs.5/-.

(6). On 7-8-1937 deft. 1 Abdul Khadar Dadamiya Barchiwale executed a Kabulayat in favour of Government in form H under rule 43 of Land - Revenue Rules, agreeing to occupy the land - C.T.No.56/M.F. annually at the standard rate of Rs.20/- per acre per annum, commencing from 1-8-1937 and obtaining permission to build -- there-on.

(7). Plaintiff complains that deft. 1 in 1942 closed even the passage on C.T.S.No.56/M.F. left by him at the time of putting up the --- compound wall, by construction of a gate and locking it and asserts that deft. 1 has no -

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++

right to do so.

(8). On 23-3-1943 plaintiff filed L.C.S No.126 No.126/42 of Dharwar II Class Subjudge's Court for injunction against deft. 1 alone restraining plaintiff from a right of way &c over C.T. S.No.56/M.F.

(9). On 10-1-1944 the Court held Government to be a necessary party to the suit (Ex.26) on - 28-1-1944 the plaint was accordingly amended by adding Government as party deft. 2. On 8-2-1944 the II Class Subjudge held that he had no --- jurisdiction to try the suit and ordered that the suit be sent for further trial to the First Class Subjudge's Court, Dharwar.

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(10) on 25-1-1944 plff. gave notice of - suit under section 80 C.P.C. to the Collector.

~~(11) On 10-2-1939 it appears the collector gave the C.T.S.No.56B/M.F. on lease to deft. 1 on payment of Rs.5/-~~

(11). On 10-2-1944 the suit was sent up by II-II Class Subjudge's Court to the Court of I Class Subjudge for further trial.

(12). In Civil Revision Application No.261/44 plaintiff filed a revision petition to the High High Court against the above mentioned order of II Class Subjudge. But the High Court --- rejected the petition on 30-1-1945.

Grounds of Defence

Notice of Suit:- It should be contended that the suit is bad for want of proper notice. In this case on 10-1-1944 the II Class Court held in L.C.S.No.126/42 that Government was a --- necessary party. On 28-1-1944 plaintiff ---- amended the plaint by adding Government as a party deft. 2 to the suit. Plaintiff also gave

the notice of suit on 25-1-1944 to the Collector, Dharwar. The procedure adopted by plff. is clearly illegal. When the Government was added a party to the suit on 28-1-1944, the period of two months after service of notice had not yet been expired as required by section 80 C.P.C. Therefore the suit is not maintainabl

Jurisdiction

X It may also please be noted that Ld. Sub-judge without taking orders of the District Judge Dharwar, sent the suit to the file of Ld. Sub-judge Dharwar, for further trial. Under section 24 of the Bombay Civil Courts Act, it appears that an order of transfer back to the file of F.C. Sub-judge, would be necessary to be made by the District Judge. If this view is correct, the presentation of plaint would be illegal.

Jurisdiction:- It may be contended that the suit is premature in so far as plaintiff has not put forward his claim to the Collector and the matter has not been decided under section 37 of the Bombay Land Revenue Code. Plaintiff ought to get his claim in the first instance decided under section 37 Bombay Land Revenue Code.

Merits:- It may also be contended that plff. has not acquired easementary rights against Government over C.T.S.No. 56/M.F. In this suit in para 5 of plaint plaintiff alleges that the only way to feach his latrines lies on the open ppace of C.T.S. No.56B leased only to Government deft. 1 and there is no other way. Plaintiff has been using this passage for getting the latrines cleansed, for the last 30 or 40 years. Obviously therefore the plaintiff has not gained a right by --- prescription under section 15 of the Indian Easements Act of 1882. It may be contended that plff. has not acquired any sort of easementary rights over the C.T.S.No.56B. In Dharwar formerly i.e. 30 years ago there were only pits used as latrines. The cleansing of latrines by Bhangis is only a recent system introduced by the -- Dharwar Muncipality.

Plaintiff's claim to other easementary -- rights also may be denied.

On these grounds it should be contended that plaintiff's suit should be dismissed with costs.

Dharwar Civil Suit No.126 of 1944.

The suit is for a permanent injunction restraining the defendants from obstructing the plaintiff's easement of a right of way across C.T.S.No.56/M.F. of Dharwar which the plaintiff claims for himself and for his scavanger for going to his latrines on C.T.S.No.56/M.F.

2. The plaintiff is the owner of C.T.S.Nos.51/M.F. 52/M.F., 53 M.F. and 54/M.F. There are six rooms on C.T.S.Nos.52,53 and 54 M.F. and two latrines on C.T.S.No.56/M. all of which are alleged to have been built 70 or 80 years ago by the plaintiff or his predecessors in title.

3. C.T.S.No.56/M.F. is admitted ~~by~~ to be an open space blonging to Government and is said to be adjacent to the plaintiffs aforesaid lands. The plaintiff claims to have acquired several rights of easement over this land for the enjoyment of his properties on C.T.S. Nos.51 to 55/M.F. but in this suit he claims only a right of way described in para.1 above.

4. C.T.S.No.56 was granted by Government to defendant No.1 by an agreement of 7th August 1937 for build-ing purposes (Form H under rule 43 of the Land Revenue Rules). Thereafter the defendant No.1 enclosed this land with a stone wall ~~bearing~~ leaving an opening in it as an access for the plaintiff and his scavenger to the latrines on C.T.S.No.55.

5. In 1942 the plaintiff complained that the defendant No.1 has closed this passage: He therefore filed suit No.126 of 1942 in the court of the Second Class Subordinate Judge, Dharwar: On 10-1-1944 the Court held that Government was a necessary party to the suit: On 25-1-1944 the plaintiff gave notice of suit to Govern-

-ment under section 80 of the Civil Procedure Code and three days later on 28-1-1944 he amended the plaint by adding Government as defendant No.2. On 8-8-1944 the suit was transferred to the Court of the First Class Subordinate, Judge, Dharwar.

6. In paragraph 5 of the plaint it is contended that Government is only a formal party and has been impleaded on account of the court's order. The injunction is asked against defendant No.1 only who is alleged to have caused obstruction in the right of way: Nevertheless, since the servient tenament (C.T.S.No.56) belongs to Govern ent, it will be necessary to deny the claims of easement set up by the plaintiff: As against Govern ent, an easement of a right of way can be acquired by a peaceful and open enjoyment of sixty years: the papers of the case do not contain any material to show whether the plaintiff has in fact acquired such right or not. The burden of proof will however be on him and he should be put to strict proof of his claim of easements. In addition, the suit suffers from the technical defect of want of two months' notice under section 80 of the Civil Procedure Code. The notice of the suit was given on 25-1-1944 and the Government was made a defendant on 28-1-1946; the suit is therefore premature and ought to be dismissed on that ground alone.

Since the facts are few and simple a brief does not appear necessary. The suit may be defended on the lines of the accompanying written statement.

RMM
13/3/46

R L.A Pleader
19/3/46
Secy RD
22-3-46

L. D.
23 MAR 1946

✓
X No 2224
d. 22-3-46.

M.C.
A R.

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Long Cause Suit No. 126 of 1942

In the Court of the Civil Judge, Senior Division, Dharwar.

Madhawarao Vasudevrao Gad of Hubli ..... Plaintiff;

Versus

Abdulkhadar Wd. Dadamiya Barchiwale, Mahalkari of Mundargi Petha.
2. The Provincial Government of Bombay.. Defendants.

Government Pleader for defendant 2 herein begs to file the following Written Statement.

(1) The suit is not maintainable for want of proper notice under section 80 of the Civil Procedure Code. This suit was first filed in the Court of the Second Class Sub-Judge, Dharwar ~~on 10th January 1944~~. That Court having held - Government as a necessary party to the suit, plaintiff gave notice of suit to Government on 25th January 1944. On 25th January 1944 plaintiff added Government defendant 2 as a party to the suit. This suit having been filed against this defendant (Government) without waiting for a period of 2 - months as required under section 80 Civil Procedure Code is premature and therefore liable to be dismissed.

(2) This defendant denies that plaintiff has acquired any easement of right of way in C.T.S.No. 56 leased by this defendant to defendant 1 either for himself or for the scavenger to cleanse the lattrines or for any other purpose. The allegations in paragraph 3 of plaint are denied.

(3) The plaintiff's claim to any other easement as alleged in paragraph 4 is ~~equally~~ also denied.

(4) This defendant submits that defendant 1 holds the C.T.S.No. 56 as a lessee ~~for~~ from Government for a period of 30 years from 1st August 1937, ~~and has all the rights of an occupant over the said land~~.

(5) It is submitted that plaintiff's suit should be dismissed with costs.

Date

District Government Pleader.

I, District Government Pleader, Dharwar do hereby state on solemn affirmation that what is contained in paragraphs 1 to 5 above is true to the information received and believed to be true. In token whereof I have signed this at Dharwar on the day of 1946.

.....

District Government Pleader.

Suits.

(Dharwar).

For a permanent injunction restraining the defendants from obstructing the - plaintiff's easement of a right of way across Government land.

GOVERNMENT OF BOMBAY.
Legal Department.
Resolution No. 3437
Bombay Castle, 8th May 1946.

Letter from the Collector of Dharwar No. L.A.W. 447 dated the 24th January 1946 - Forwarding papers in the suit noted in the margin and requesting sanction to its defence.

Endorsement, by the - Commissioner, Southern Division, No. L.S.T.353, dated the 5th February 1946 -

In the Court of the Civil Judge (Senior Division) Dharwar.

Long Cause Suit No. 126 of 1945.

Madhawrao Vasudevrao Gad of Hubli. .. Plaintiff;

Versus

1. Abdulkhadar wd. Dadamiya Barchiwale Mahalkary of Mundargi Petha. ..
2. The Provincial Government of Bombay. } Defendants.

Claim- Rs. 5/-.

Forwarding the above with his concurrence.

Memorandum to the District Government Pleader, Dharwar No. 2362, dated the 28th March 1946 - Forwarding a copy of the Written Statement with its accompaniments in advance.

RESOLUTION. - Sanction is accorded to the defence of the suit on the lines of the Written Statement forwarded to the District Government Pleader, Dharwar, with memorandum No. 2362, dated the 28th March 1946.

By order of the Governor of Bombay,

original R. M. Mehta
Assistant Secretary to Government.

Issued HBS 8/5

To

The Revenue Department,
The Commissioner, Central Division,
The Collector of Dharwar,
The District Government Pleader, Dharwar.

Submitted for your Hon'r 8/5

LK. 8 A.J.M.